

JAYA PRAKASS KARUPPAN

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v.

PP

HIGH COURT MALAYA, JOHOR BAHRU

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VERNON ONG LAM KIAT JC

[CRIMINAL APPEAL NOS: (MT-1) 41-09-2008 & 41-10-2008]

16 SEPTEMBER 2009

CRIMINAL LAW: *Customs Act 1967 - Sections 135(1)(g) and 133(1)(b) - Smuggling - Whether prosecution officer from Customs Department has locus standi to conduct a criminal prosecution - Meaning of the word "conduct" - Whether should be given a purposive meaning - Untrue or incorrect declarations - Whether accused made or signed declarations - Criminal Procedure Code, ss. 376, 377 - Federal Constitution, art. 145*

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CRIMINAL PROCEDURE: *Prosecution - Conduct of - Whether prosecution officer from Customs Department has locus standi to conduct a criminal prosecution - Meaning of the word "conduct" - Whether should be given a purposive meaning - Criminal Procedure Code, ss. 376, 377 - Federal Constitution, art. 145*

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CRIMINAL PROCEDURE: *Prosecution - Authorisation to prosecute - Whether prosecution officer from Customs Department has locus standi to conduct a criminal prosecution - Meaning of the word "conduct" - Whether should be given a purposive meaning - Criminal Procedure Code, ss. 376, 377 - Federal Constitution, art. 145*

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CONSTITUTIONAL LAW: *Prosecution of offences - Authorisation - Whether prosecution officer from Customs Department has locus standi to conduct a criminal prosecution - Meaning of the word "conduct" - Whether should be given a purposive meaning - Criminal Procedure Code, ss. 376, 377 - Federal Constitution, art. 145*

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CUSTOMS AND EXCISE: *Declaration - False declaration - Whether declarations untrue or incorrect in any particular - Whether accused made or signed declarations - Customs Act 1967, s. 133(1)(b)*

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STATUTORY INTERPRETATION: *Construction of statutes - Purposive approach - Whether prosecution officer from Customs Department has locus standi to conduct a criminal prosecution - Meaning of the word "conduct" - Whether should be given a purposive meaning - Criminal Procedure Code, ss. 376, 377 - Federal Constitution, art. 145*

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- A The appellant ('Jaya') was charged with two smuggling offences under the Customs Act 1967 ('the Act'). He was convicted and fined RM500,000 on the first charge under s. 135(1)(g) of the Act, but acquitted and discharged on the second charge under s. 133(1)(b) of the Act. Jaya appealed against the conviction and sentence on the first charge while the prosecution appealed against Jaya's acquittal and discharge on the second charge. Jaya's sole submission was that the prosecution officer from the Customs Department did not have the *locus standi* to institute a charge. Jaya's contention was centred on the word "conduct" appearing in art. 145 of the Federal Constitution and s. 376(3) of the Criminal Procedure Code ('CPC') which, it was averred, does not include the power to institute proceedings.

Held (dismissing both appeals):

- D (1) If Jaya's contention were to be accepted, it would mean that the deputy public prosecutor ('DPP') must first tender the charge before a prosecution officer of the Customs Department or any other government department can conduct any criminal prosecution. To restrict the meaning of the word "conduct" to the extent described by Jaya would render s. 377 of the CPC meaningless and impractical. With respect, this contention was not consonant with the wordings and intention behind s. 377 of the CPC. A DPP is vested with authority under s. 376 of the CPC to exercise the rights and powers vested in or exercisable by the Public Prosecutor. In the exercise of these rights and powers the DPP authorised the prosecution officer of the Customs Department to conduct a criminal prosecution. Reading the words of s. 377 of the CPC it is clear that the conduct of any criminal prosecution should be given a purposive meaning in its fullest sense – so that the conduct of criminal prosecutions should include the right and power to institute, carry out and discontinue criminal proceedings. *PP v. Datuk Harun Hj Idris & Ors* (dist); *PP v. Lim Shui Wang & Ors* (dist); *Repeco Holdings Bhd v. PP* (dist). (para 7)
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- I (2) In a charge under s. 133(1)(b) of the Act, the onus lies upon the prosecution to prove the following factual ingredients of the offence *viz.* (i) the accused made or signed the declaration; and (ii) the declaration is untrue or incorrect in any particular. On the facts, although it had clearly been established that the

declarations in exhs. P13 and P14 were untrue and incorrect, there was no evidence to show that Jaya made or signed exhs. P13 and P14. In a criminal trial the onus lies throughout on the prosecution to prove its case beyond reasonable doubt. On examining the notes of evidence and the grounds of judgment of the learned trial magistrate, it was clear that there were insufficient grounds to interfere with the order of acquittal. *PP v. Osman Apo Hamid & Anor* (dist); *Ang Seng Ho v. PP* (dist); *PP v. Teo Kwang Kiang* (dist); *Myrna G Marinay v. PP* (dist); *Tapah Bongkol v. PP* (dist). (para 9)

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Case(s) referred to:

Ang Seng Ho v. PP [1991] 2 CLJ 986; [1991] 2 CLJ (Rep) 265 HC (dist)

Kyohei Hosoi v. PP [1998] 1 CLJ 1063 HC (refd)

Myrna G Marinay v. PP [1993] 3 CLJ 79 HC (dist)

Perumal v. PP [1970] 1 LNS 101 FC (refd)

PP v. Datuk Harun Hj Idris & Ors [1976] 2 MLJ 116 (dist)

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PP v. Lew Koy [2002] 1 CLJ 86 HC (refd)

PP v. Lim Shui Wang & Ors [1978] 1 LNS 155 FC (dist)

PP v. Osman Apo Hamid & Anor [1976] 1 LNS 110 (dist)

PP v. Teo Kwang Kiang [1992] 1 CLJ 318; [1992] 4 CLJ (Rep) 483 HC (dist)

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PP v. Tiong Ching Heng [1990] 2 CLJ 87; [1990] 2 CLJ (Rep) 880 HC (refd)

PP v. Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC (refd)

Rajendran Gurusamy v. PP [2001] 1 CLJ 631 HC (refd)

RepcO Holdings Bhd v. PP [1997] 4 CLJ 740 HC (refd)

Tapah Bongkol v. PP [2000] 1 LNS 91 (dist)

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Legislation referred to:

Anti-Corruption Act 1997, s. 26(1)

Courts of Judicature Act 1964, s. 25(2)

Criminal Procedure Code, ss. 129, 376(1), (3), 377(b)(3)

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Customs Act 1967, ss. 133(1)(b), (2), 135(1)(g)

Exclusive Economic Zone Act 1984, s. 38

Federal Constitution, art. 145(3)

Immigration Act 1959/1963, s. 58(2)

Poisons Act 1952, s. 34

Securities Commission Act 1993, s. 39(2)

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Securities Industry Act 1983, s. 126(2)

For the appellant - J Ravindran; M/s GSP Ravindran & Co

For the respondent - Saidah Mohd Halil DPP

Reported by Suresh Nathan

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JUDGMENT**Vernon Ong Lam Kiat JC:**

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[1] Jaya Prakass ('Jaya') was charged with two smuggling offences under the Customs Act 1967. On the first charge under s. 135(1)(g) of the Act he was convicted and fined RM500,000. On the second charge under s. 133(1)(b) of the Act he was acquitted and discharged. Jaya is appealing against conviction and sentence on the first charge. The prosecution has appealed against the acquittal and discharge on the second charge.

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Jaya's Appeal Against Conviction

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[2] At the hearing of the appeal learned counsel raised only one issue – the prosecution officer from the customs department did not have *locus standi* to institute a charge. Learned counsel's contention is premised on the following grounds:

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(a) under art. 145(3) of the Federal Constitution only the Attorney General has the discretion to institute, conduct and discontinue criminal proceedings;

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(b) the letter of authority (P1 and P2) granted to the prosecution officers of the customs department under s. 377(b) of the Criminal Procedure Code ('CPC') is valid only for the purposes of conducting prosecution and not to institute prosecution; and

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(c) the prosecution is null and void and unconstitutional pursuant to art. 145(3) of the Federal Constitution and s. 377(b)(3) CPC.

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[3] Learned counsel submitted that by virtue of art. 145 of the Federal Constitution and s. 376(3) CPC only the deputy public prosecutor (DPP) has the right to institute, conduct or discontinue any criminal prosecution or proceedings. And by virtue of s. 377(b)(3) the DPP and any government officer has the right only to conduct criminal prosecution. In this context it was submitted that s. 377(b)(3) only allows a government officer with the written authority of the DPP to conduct criminal prosecution. The authority in P1 and P2 to the prosecution officers merely stated that the holder can 'menjalankan (conduct) pendakwaan' and not to 'membawa (institute) pendakwaan'. The word 'conduct' does not

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extend to instituting or bringing charges. In the course of his

submission learned counsel referred to the following authorities – *Perumal v. PP* [1970] 1 LNS 101 FC; *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 180; *PP v. Lim Shui Wang & Ors* [1979] 1 MLJ 65; *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740; *Kyohei Hosoi v. PP* [1998] 1 CLJ 1063; *Rajendran Gurusamy v. PP* [2001] 1 CLJ 631. Learned counsel then submitted that the prosecution officers in question did not have the legal authority under art. 145(3) of the Federal Constitution and s. 376(3) CPC. The learned trial Magistrate erred in law in concluding that the word ‘conduct’ in s. 377CPC had a wide meaning including instituting proceedings of a case from beginning to end and that P1 and P2 authorise the two prosecution officers to institute prosecution.

[4] In reply learned deputy submitted that it is settled law that a DPP is the alter ego of the Public Prosecutor (‘PP’) and may carry out the powers of the PP. Authority was given to the prosecution officers under P1 and P2 (*PP v. Tiong Ching Heng* [1990] 2 CLJ 87; [1990] 2 CLJ (Rep) 880 and *Perumal v. PP* [1970] 1 LNS 101). The prosecution officers had the authority and power to conduct prosecution.

Findings Of The Court

[5] Jaya’s contention is centred on the meaning of the word ‘conduct’ appearing in art. 145 of the Federal Constitution and s. 377 CPC. It is contended that the word ‘conduct’ does not include the power to institute proceedings. The power to institute, conduct or discontinue criminal prosecutions and proceedings is vested in the Attorney General by art. 145 of the Federal Constitution and under s. 376(1) CPC. This is not a case where the sanction or consent of the PP is required in order for the prosecution officers from the customs department to institute proceedings. The sanction of the PP is only required for specific offences. Some of these offences include those specifically provided for in s. 129 CPC, s. 34 of the Poisons Act 1952, s. 38 of the Exclusive Economic Zone Act 1984, s. 26(1) of the Anti-Corruption Act 1997 and s. 58(2) of the Immigration Act 1959/1963.

[6] The prosecution officers were authorised in writing by a DPP under s. 377(b) CPC; the powers of the DPP to give the said authority are delegated to the DPP under s. 376(3) CPC. The issue in this appeal relates not so much to the validity of the authority but to the wordings ‘untuk menjalankan pendakwaan’. Learned

- A counsel for the appellant contends that ‘menjalankan’ which means ‘conduct’ does not include ‘institute’. As such the institution of criminal proceedings by the prosecution officers were invalid. In *PP v. Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 the Supreme Court held that once the court had taken cognizance of the offence
- B and was seized with jurisdiction to try the case, the institution of the proceedings by the PP was complete. In the present case there is nothing in the notes of evidence to show that Jaya or his counsel had objected to the institution of the criminal charge. The trial court had proceeded with the trial after the charge had been read
- C and Jaya had claimed trial (see also *PP v. Lew Koy* [2002] 1 CLJ 86). Be that as it may, s. 377 CPC quite clearly states that

Every criminal prosecution before any court and every inquiry before a Magistrate shall, subject to the following sections, **be conducted:**

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- (a) by the Public Prosecutor, a Senior Deputy Public Prosecutor, a Deputy Public Prosecutor or an Assistant Public Prosecutor;
- (b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorized in writing by the
- E Public Prosecutor:
- (1) an advocate;
- (2) a police officer not below the rank of Inspector;
- F (3) an officer of any Government department;
- (4) an officer of any local authority;
- (5) an officer of any statutory authority or body; or
- G (6) any person employed or retained by any local authority or any statutory authority or body;

- provided that in any district in which it may be impracticable, without an unreasonable amount of delay or expense, that such prosecutions or inquiries should be so conducted it shall be lawful for the Public Prosecutor from time to time, by notification in the
- H Gazette, to direct that prosecutions may be conducted in that district by a police officer below the rank of Inspector.

- [7] Learned counsel for Jaya placed much emphasis on the fact that art. 145 of the Federal Constitution empowered the PP ‘to institute, conduct or discontinue ...’, whereas under s. 377 CPC, the power is only to ‘conduct’ prosecution. If Jaya’s contention is
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accepted, it would mean that before a prosecution officer of the customs department or any other government department for that matter can conduct any criminal prosecution, the charge must first be tendered by a DPP. To restrict the meaning of the word 'conduct' to the extent described by learned counsel for Jaya would render s. 377 CPC meaningless and impractical. With respect, this contention is not consonant with the wordings and intention behind s. 377 CPC. A DPP is vested with authority under s. 376 CPC to exercise the rights and powers vested in or exercisable by the PP. In the exercise of these rights and powers the DPP authorised the prosecution officers of the customs department to conduct criminal prosecution. Reading the wordings of s. 377 CPC it is clear that the conduct of any criminal prosecution should be given a purposive meaning in its fullest sense – so that the conduct of criminal prosecution should include the right and power to institute, carry out and discontinue criminal proceeding. *PP v. Datuk Harun Hj Idris, supra* is distinguishable as it relates to the exercise of the PP's power to issue a certificate specifying that a High Court try a case which is triable by a subordinate court. *PP v. Lim Shui Wang & Ors, supra* relates to the power of a judge of the High Court to transfer a case to the subordinate court under s. 25(2) of the Courts of Judicature Act 1964; this case is also distinguishable on the facts and law. In *Repco Holdings Bhd, supra* the defence challenged the *locus standi* of the two officers who appeared to prosecute the case. The two officers were officers of the Securities Commission, a body created by the Securities Commission Act 1993 ('SCA'); the prosecution of the case was in the hands of the two officers pursuant to s. 126(2) of the Securities Industry Act 1983 and s. 39(2) of the SCA. The Court of Appeal in construing art. 145 of the Federal Constitution held that only the Attorney-General and no other authority may be lawfully empowered to exercise that function. *Repco Holdings Bhd, supra* is accordingly distinguishable and of no aid to Jaya's contention. For the foregoing reasons Jaya's appeal against conviction and sentence is dismissed.

Prosecution's Appeal Against Acquittal

[8] The charge under s. 133(1)(b) of the Act relates to the making of a customs declaration by Jaya which is untrue or incorrect. In particular Jaya is accused of making two false declarations on 7 September 2001. The items were declared to be '4 pallet rubber cot pinch collar, 3 pallet suspension spring, 4 pallet

- A cap pinch roller dan 5 pallet arm pinch roller' when in fact the items consisted of "3768 botol x 4 liter cecair yang mengandungi codein dan 1 drum x 25 liter cecair berwarna coklat hitam". The prosecution's appeal is premised on the following grounds.
- B (a) The evidence of SP1, SP2, SP3 and SP12 and exhs. P13 and P14 shows that an offence under s. 133(1)(b) was committed.
- (b) The only evidence required under s. 133(1)(b) is that a false declaration was made.
- C (c) The learned Magistrate erred in failing to apply the best evidence rule when she ruled that expert evidence was required in order to ascertain the authenticity of SP9's signature on the customs declaration forms exhs. P13 and P14.
- D (d) Section 133(1)(b) is a strict liability offence.
- (e) It is no defence to allege that the accused did not understand the contents of the declaration made (s. 133(2)).
- (f) P13 and P14 is untrue or incorrect.

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Findings Of The Court

[9] In a charge under s. 133(1)(b) of the Act, the onus lies upon the prosecution to prove the following factual ingredients of the offence *viz*:

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- (i) the accused made or signed the declaration; and
- (ii) the declaration is untrue or incorrect in any particular.

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Upon proof of the two ingredients, it is no defence for the accused to say that the declaration was made or use inadvertently or that the accused was not aware of or did not understand the contents of such declaration (sub-section (2) of s. 133). According to the evidence of SP1, SP2, SP3, SP4 and SP12 it is established that P13 and P14 are untrue and incorrect. In P13, the goods are described as '4 Pallet Cap Pinch Roller' and '5 Pallet Arm Pinch Roller' and in P14 the goods are described as '4 Pallet Rubber Cot Pinch Roller' and '3 Pallet Suspension Spring'. On examination the customs officers found that the lorry in fact contained 3768 bottles of codein and a drum of dark brown liquid. In the premises, it has

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clearly been established that declarations in P13 and P14 are untrue and incorrect. The remaining ingredient relates to the evidence linking Jaya to P13 and P14. Learned deputy's contention that the only evidence required under s. 133(1)(b) of the Act is that a false declaration was made is not consonant with the words of the said section. It only makes liable whoever makes, orally or in writing, or signs the declaration. Is there any evidence to show that Jaya made or signed P13 and/or P14? According to P13 and P14 the party making the declaration is Yamuchi Sdn. Bhd. It bears the rubber stamp of the said company and an illegible signature. There is no evidence to show that Jaya made or signed P13 and P14. Learned deputy submitted that the offence under s. 133(1) is a strict liability offence and that it is no defence for Jaya to say that he did not sign P13 and P14. Section 133(2) provides that it is no defence to say that such declaration was made or used inadvertently or that the person signing the same was not aware of or did not understand the contents of such document. Learned deputy's contention is misconceived because s. 133(2) only precludes such a defence after it is established that Jaya made or signed P13 and P14. The following authorities cited by learned deputy are distinguishable on the facts and law (*PP v. Osman bin Apo Hamid & Anor* [1976] 1 LNS 110; *Ang Seng Ho v. PP* [1991] 2 CLJ 986; [1991] 2 CLJ (Rep) 265; *PP v. Teo Kwang Kiang* [1992] 1 CLJ 318; [1992] 4 CLJ (Rep) 483; *Myrna G Marinay v. PP* [1993] 3 CLJ 79; and *Tapah bin Bongkol v. PP* [2000] 1 LNS 91). Learned deputy also submitted that SP9 (an employee of Yamuchi Sdn. Bhd.) whose name appears as the person who prepared P13 and P14 did not sign P13 and P14. SP9 testified that she did not prepare P13 and P14 and that the signatures on it are not her signatures. It was not necessary for the prosecution to produce expert evidence to show that the signatures were not hers. On this issue, unless SP9's evidence was challenged, which it was not, her evidence that she did not prepare and sign P13 and P14 ought to be accepted. If so, then it brings in question as to who is the maker of P13 and P14. In a criminal trial the onus lies throughout on the prosecution to prove its case beyond reasonable doubt. On examining the notes of evidence and grounds of judgment of the learned trial magistrate, the court does not consider that there is any sufficient ground for interfering with the order of acquittal. Accordingly, the prosecution's appeal against the order of acquittal is dismissed.